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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
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3 RIO TINTO PLC,

4 Plaintiff,

5 v.

14 CV 3042 (RMB) (AJP)

6 VALE, S.A., ET AL.,

7 Defendants.

8 -----x
9 New York, N.Y.
June 1, 2015
2:00 p.m.

10 Before:

12 HON. ANDREW J. PECK,

13 Magistrate Judge

15 APPEARANCES

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1 (In open court)

2 THE COURT: Welcome on this nice rainy day. The idea
3 of you giving me a joint letter is great, but it falls apart
4 when there are then six other supplemental letters. So I am
5 going to work off of the joint letter first, and then work our
6 way around to the other letters.

7 Do you all have your E-discovery experts/consultants
8 here? With respect to the training documents the Rio Tinto
9 training Vale's motion on this, the argument seems to be that
10 if there are only a small number of training documents on a
11 particular subtopic that that is not going to be sufficient.
12 And I am not sure that that is correct.

13 So, Mr. Reents, it is your application. Proceed.

14 MR. REENTS: Your Honor, I don't know that I would say
15 that there is a particular number that has to be to be in
16 there, but there does need to be a critical mass, and they do
17 need to be appropriate training documents.

18 THE COURT: The question is, what is a critical mass?

19 MR. REENTS: Yes.

20 THE COURT: In other words, if the richness of the
21 corpus is such that it is 10 percent rich on subject A and only
22 1 percent rich on subject B, as long as there are positive
23 training documents for both A and B, does it matter how many of
24 them there are or whatever constitutes your sufficient corpus?
25 In other words, is one enough, for example?

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1 MR. REENTS: I don't think it is, your Honor.

2 Moreover --

3 THE COURT: Now I need somebody with Ph.D. or computer
4 scientist after their name to tell me more about it, because I
5 am not sure you're right.

6 MR. REENTS: I think the declaration addressed this
7 issue, from Mr. Hajarian. He states that if you don't have
8 sufficient examples from the different categories of documents
9 you are not --

10 THE COURT: What is sufficient is the question.

11 MR. REENTS: Yes. I think that Mr. Hajarian would say
12 there is not a bright line that you can draw for this number.

13 THE COURT: I guess I'm saying how many more documents
14 would you like them to train on, on the subjects that are of
15 the lesser number of training documents?

16 MR. REENTS: Your Honor, I think we are looking at
17 somewhere in the ballpark of 15 to 20, which is sort of the low
18 end of the number of documents that we've trained on all of the
19 issues that they have asked us to look for in our universe.

20 THE COURT: Do you have examples of such additional
21 documents to use as training documents, or do they have to
22 search blindly to find 14 more if they've got one or whatever?

23 MR. REENTS: We don't, because we don't have the
24 appropriate documents from them. But we just e-mailed them a
25 short time ago to offer to meet and confer with them to propose

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1 search terms that they can use.

2 THE COURT: It's getting kind of late in the day for
3 much more meeting and conferring.

4 Who am I going to hear from?

5 MS. McCAFFREY: Your Honor, Meghan McCaffrey for Rio
6 Tinto. Respectfully, your Honor, I think you have hit the nail
7 on the head.

8 I also would offer, if you would like to see it, I
9 have compiled a chart that does detail the documents that we do
10 believe are responsive to the various requests that Mr. Reents'
11 letter has outlined. We actually do believe there are more
12 than sufficient documents that are responsive to, for example,
13 requests 13, 40 and 45, for example, the first bullet point.

14 We have including -- for example, nonprivileged
15 documents, we show at least 39 documents as being responsive to
16 those requests. When you include privileged documents, that
17 goes up to 70 documents. Our total universe of documents that
18 we are training the system on includes 400 documents. Those
19 are nonprivileged and privileged documents.

20 Like I said, we are more than willing to continue to
21 work with Vale to continue to address their concerns with this,
22 but we do believe that the system is more than adequately
23 trained.

24 We are training it on concepts. We are getting a
25 comprehensive data universe to produce our documents here.

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1 More importantly, we also over the weekend did do a
2 statistically relevant sample of our documents that were coded
3 as nonresponsive by the system. Our allusion rate is showing a
4 2.5 percent response rate. We truly do believe that we are
5 getting the responsive documents and will be producing those to
6 the defendants.

7 MR. REENTS: Your Honor, I think it is not just a
8 question of the numbers, although this is the first that I am
9 hearing of the additional documents that they think are
10 responsive, although we alerted them to this issue a week ago.

11 But it is also the quality. If you look at the nine
12 documents that we believe are responsive to these requests, we
13 are talking about the critical issues in the case here from our
14 perspective.

15 It's the response to the announcement that they've
16 lost the concession. It's the announcement that BSGR has
17 gained the concession. For those topics we have not seen any
18 internal e-mails, the kinds of e-mails where they are talking
19 about why did this happen, what do we do next, as they allege
20 was Vale involved in this.

21 THE COURT: Do you have any reason to believe that
22 they are an e-mail heavy user?

23 MR. REENTS: Well, we know that they have some two or
24 three million e-mails in their collection. It is a very
25 substantial e-mail collection.

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1 THE COURT: All right. Here's the problem. You both
2 have used -- and I warned you about it at the time -- a very
3 generic protocol for your respective predictive coding
4 approaches. It is not necessarily the approach that is the
5 best in the world, frankly, on either of you. And you know,
6 you are giving me the, it's bigger than a breadbox or it's not
7 bigger than a breadbox.

8 I agree there needs to be an appropriate number of
9 training document for each subset. You are saying there aren't
10 enough; maybe 14 more would suffice. They are saying there are
11 enough and that in fact they have not used 9 documents, but 39.

12 I've offered you all previously a special master
13 expert in the use of TAR. You all said you didn't need it.

14 I am in no position to rule on this at this stage.
15 Obviously, you have in the protocol that there will be
16 statistical sampling and quality control of the null set, the
17 documents not shown as responsive.

18 If it really is that there was nothing in the garbage
19 file that should have been produced, then maybe these documents
20 didn't exist, and you will find that out when you depose people
21 or you'll find out the converse, that there were lots and lots
22 of e-mails on this subject and that plaintiff didn't
23 sufficiently find them.

24 The only other suggestion I would make, if you both
25 want to do it, there is a recent article in prepublication form

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1 from people I believe to be expert in this area that say one
2 can create a synthetic document, which is essentially taking
3 the language of the document requests, removing words like "all
4 documents relating to" and putting just the gist of the
5 requests into a Word document.

6 If you are both willing to do that, then maybe that is
7 an easy solution, and retrain and see what else, if anything,
8 bubbles up accordingly. That would mean you would have to do
9 it on your side with their requests, and they would do it with
10 your requests. Maybe that would show that something is missing
11 now, maybe it wouldn't.

12 I offer that as a suggestion. I offered the special
13 master as a suggestion, and it could be on a help you basis as
14 opposed to necessarily rule.

15 MR. REENTS: Your Honor, we would be in favor of both
16 of those, a special master and discussion --

17 THE COURT: Where were you two months ago when this
18 issue first came up?

19 You've got a June 30 substantial completion date.
20 Even if the person I am thinking of to appoint as your special
21 master is instantly available, it is a little late.

22 MR. REENTS: Your Honor, my understanding was that
23 both parties were in favor of a special master, but we
24 reconsidered based on --

25 THE COURT: Certainly nobody told me you wanted a

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1 special master, whether it's you both did want to go that
2 route, but nobody told me, or one of you did and one of you
3 didn't or everybody's positions are changing.

4 You want a special master, too? Yes? No? I mean
5 obviously you are paying big firm rates. Did I mention the
6 name of the person I was thinking of last time?

7 MR. REENTS: You did.

8 THE COURT: OK. You are paying for a senior counsel
9 level at Wachtell, which I'm sure ain't cheap.

10 MS. McCAFFREY: Yes, your Honor. We certainly are not
11 opposed to it. I think we need to discuss it with our client.
12 I think, frankly, part of the reason the parties had backed off
13 of it is that Judge Berman I think had very specifically --
14 there was an order in place where Judge Berman had told us
15 that -- had basically said no, no special masters. So I think
16 that was why we had backed off of it, frankly.

17 THE COURT: OK.

18 MS. McCAFFREY: He said we had the best.

19 THE COURT: Lucky me. We will put a pin in that.

20 If you both tell me you want it, then obviously you
21 will have to clear conflicts and you will have to work out the
22 financial arrangements.

23 It may be because Ms. Grossman uses continuous active
24 learning, I think neither of your systems are continuous active
25 learning systems, so we certainly do not have time to start

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1 from scratch. Nevertheless, consult with your clients, get
2 back to me promptly.

3 You will still, however, be on the current schedule,
4 so you may have waited too long or gotten mixed signals from me
5 and Judge Berman.

6 In any event, the one thing we can immediately do, how
7 do you both feel about running a Word document created off of
8 the document requests as an additional training document?

9 MS. McCAFFREY: Excuse me. I'm just consulting with
10 my expert.

11 THE COURT: Your expert is free to speak directly if
12 he tells me who he is.

13 MR. CHN:

14 MR. CHAN: Judge, I am Kinny Chan from Precision
15 Discovery. There's no technical limitation on adding that
16 document into the system and every running categorization.

17 THE COURT: So that is a yes?

18 MS. McCAFFREY: I think we are fine with it, yes, as
19 long as obviously it's mutual from both sides, we would be
20 running the same.

21 THE COURT: You would be running the flip?

22 MS. McCAFFREY: Yes, sir. I'm sorry. Excuse me.
23 Yes, sir.

24 MR. REENTS: Pending confirmation with our vendor that
25 that is there are no technical issues, which I wouldn't expect

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1 there to be, we would like to do that as well.

2 THE COURT: Good. OK.

3 MR. REENTS: Your Honor, I would like to say that the
4 training exercise wouldn't necessarily need to be limited to
5 that composite document. I think there are other documents in
6 the universe. We would like the opportunity to identify those
7 documents and Rio Tinto's document collection for feeding it as
8 well.

9 THE COURT: Here's the problem, as I understand it,
10 and I'll let our expert here tell me otherwise. Since you are
11 not doing continuous active learning on either side, at some
12 point they will be done or partially done, and if you then say,
13 well, you have now produced ten additional documents, we would
14 like you retrain on them, I am not sure what that does if we're
15 too late into the game.

16 Mr. Chan?

17 MR. CHAN: Your Honor, it shouldn't make a difference
18 if it's continuous active learning, simple passive learning.
19 It is all a matter of validation, that final validation step
20 that we've written into the protocol.

21 THE COURT: They are not talking about doing it at the
22 validation stage. They are all talking about, you are all
23 doing rolling productions. As I understand Mr. Reents, it is
24 that if in your first rolling production they find other 20
25 documents, 25 documents, whatever, that they think would be

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1 better training documents or additional training documents,
2 they would like you to retrain and restabilize the system. If
3 you are telling me you can do that --

4 MR. CHAN: Right, any system should be able to do
5 that.

6 THE COURT: OK.

7 MS. McCAFFREY: Judge, frankly my concern becomes now,
8 it is June 1 now. We are 29 days out from when we are supposed
9 to have substantial document production complete. This ongoing
10 process, at some point we need to have the system stabilized
11 and this is an ongoing process.

12 THE COURT: The only way that this is going to work,
13 and maybe I'm missing this, is when you stabilize the system
14 you start producing, and we've talked about not producing
15 everything on June 30 --

16 MS. McCAFFREY: Agreed.

17 THE COURT: -- in bulk, but in waves, so that if in a
18 week you give them the first wave of production and they look
19 at it and say there are some really great documents on subject
20 A, B, and C here that we thought were underrepresented in the
21 training set, please use the following 25 documents, retrain or
22 supplement train, and then keep producing more relevant
23 documents. Does that work or not?

24 MS. McCAFFREY: Yes, it can work. But I guess my
25 point is we've already had 400 documents that we are using to

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1 train the system. As I said before, we have numerous documents
2 that are being used to train these specific requests.

3 THE COURT: If your training was sufficient, the new
4 documents shouldn't turn up much, if anything, new. Let's see
5 what happens. I am not ruling on it per se other than the
6 synthetic document that you have both agreed to. We will go
7 from there and see what happens as the production continues.

8

9 MR. REENTS: Your Honor, could we have a date when the
10 parties will report back to you on what their plan is with
11 respect to both the special master and this additional
12 training.

13 THE COURT: The special master, if you don't get back
14 to me tomorrow or the next day, the ship which may already have
15 long since passed, will certainly have passed, particularly
16 because Ms. Grossman is going to have to get a conflict check
17 and all the usual stuff at a big firm to make sure she is able
18 to do it even if you all want her.

19 So the faster you all decide, yes, that you're willing
20 to split her fee 50/50 and that she will help you all with this
21 sort of nitty gritty stuff, because she talks the talk and
22 walks the walk, so be it.

23 I am not setting an absolute deadline other than
24 whoever wants it better say yes first and put pressure on the
25 other side if that's the way it goes.

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1 OK. Next issue. This is the two big parties, if that
2 is the issue you are going to raise.

3 MR. SUMMIT: Your Honor, if I may be heard just
4 briefly, Paul Summit for defendant Thiam. You haven't heard
5 much from us lately with regard to that synthetic document that
6 these parties are talking about creating.

7 There are a number of document requests we served a
8 couple of months ago, a month and a half ago, and a tremendous
9 amount of those document requests are embraced already in the
10 ongoing dialogue between these parties. There are a few issues
11 that we believe are not --

12 THE COURT: Just get with them and add it to the list.

13 MR. SUMMIT: Perfect. Thank you.

14 THE COURT: OK. Vale's third document request.

15 I am not sure where you are in agreement or
16 disagreement here, despite the letter.

17 MR. LIMAN: Your Honor, Lewis Liman for Vale. Let me
18 say first that this doesn't have to do with the June 30
19 deadline. This is the subsequent set of document requests
20 which are not under the same time pressure. I believe that our
21 disagreement is confined to request 62 and request 63.

22 We have laid out in 62 by category the types of
23 documents we're looking for. There is a little bit of a
24 strawman on the other side, where they say that our request
25 could call for every single press release.

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1 That's not what's intended. So I think, for the
2 Court's benefit, it's really on page 10, the four categories of
3 documents with respect to 62 and then 63 there is also
4 disagreement.

5 THE COURT: All right. Who am I hearing from?

6 MR. LYTTLE: Good afternoon, your Honor, Eric Lyttle
7 for Rio Tinto.

8 A little background. These are document requests
9 related to the April 2011 settlement agreement in which Rio
10 Tinto gave up its fight essentially for blocks one and two in
11 order to secure its rights to blocks 3 and 4.

12 Vale has already served extremely broad discovery
13 related to the April 2011 settlement, including in their very
14 first set of requests, which had a request for all
15 communications with the Guinean government about the April 2011
16 settlement agreement.

17 We have agreed to produce in response to that, in
18 fact, we count ten requests focused only on --

19 THE COURT: That's what I thought.

20 So let me be clear. Whether specifically responding
21 to new request No. 62 or responding via the prior requests, are
22 you producing all documents relating to that settlement
23 agreement as encompassed by the categories on page 10 of the
24 joint letter?

25 Yes or no?

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1 MR. LYTTLE: No, your Honor.

2 THE COURT: OK. Go ahead.

3 MR. LYTTLE: The problem, your Honor, is that 62 talks
4 about third parties. It's completely unmoored in any way shape
5 or form.

6 THE COURT: But it's now moored by page 10. So the
7 third parties are Chinalco, Chalco, IFC, internal and external
8 auditors, insurers, consultants and advisers.

9 MR. LYTTLE: I appreciate that, your Honor. That is
10 news to us. We learned that just sitting here now.

11 That's nice. The request as drafted was included but
12 not limited to -- and in the meet-and-confers they were
13 specifically not willing to limit to it those.

14 THE COURT: I assume when you send thee letters you
15 actually read the other side's position.

16 MR. LYTTLE: I think that is a flaw in this process,
17 your Honor. We are ships passing in the night. We exchange
18 topics. We do not get to see, nor do they get to see, the
19 substantive insert. It is a flaw in the process. I would like
20 that.

21 THE COURT: You have seen the final letter which came
22 out on May 28. So that letter told you what they were limiting
23 this to, to the extent that it was too broad to begin with.

24 Let's cut to the chase.

25 MR. LYTTLE: The cut to the chase, your Honor. It is

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1 still not limited in subject matter. We would be willing to
2 look for documents for these third parties, but it is any
3 communication related to the April 2011 settlement agreement.
4 It is not in any way related to the decision to enter into
5 that, the status of our rights, or even the cost benefit, which
6 are the areas of relevance they have identified.

7 If we can limit 62 to these parties --

8 THE COURT: What is this that you want to limit out.
9 That's what I am trying to understand here.

10 MR. LYTTLE: Right now this request is worded for any
11 piece of correspondence or communication that mentions the
12 April 2011 settlement agreement.

13 THE COURT: How many documents are we talking about?

14 MR. LYTTLE: We are talking likely under that a
15 massive amount of documents. This was a big deal for this
16 company.

17 THE COURT: That mentions the settlement agreement?

18 MR. LYTTLE: That just says April 2011 settlement
19 agreement. What we are trying to do is confine -- they have
20 confined the third parties. We would like would --

21 THE COURT: I think you are going to have a further
22 meet-and-confer on this, because there are so many letters.
23 I've got a 3:30 conference call on another case. So you all
24 figure out how to use your remaining hour and -- I have to get
25 downstairs for that, so now an hour and five minutes.

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1 Do you want to do that right now? Do you want to have
2 me send you and Mr. Liman into the back when we're done with
3 everything else?

4 It sounds like there hasn't been a full
5 meet-and-confer on this. So tell me how you want to use your
6 time, Mr. Lyttle

7 MR. LYTTLE: I'm happy to discuss it more with
8 Mr. Liman. I think it is a lot to get through today. I would
9 suggest that we do that afterwards, like we did last time.

10 THE COURT: Mr. Liman, any problem with that?

11 MR. LIMAN: Yes, your Honor. Let me try to keep it
12 quick.

13 THE COURT: Just to be clear, I am not going to send
14 you home. It just means hopefully we'll get everything done by
15 3, but if not, we will go until 3:30, I will take my other
16 conference call -- that should take 15 minutes to half an
17 hour -- you will use that period to talk, which you should have
18 been doing beforehand. Maybe you have and maybe you haven't.

19 Go ahead.

20 MR. LIMAN: Your Honor, we have.

21 My issue is twofold.

22 One, I think we need a decision on this issue.

23 THE COURT: You are going to get a decision. The
24 question is whether you would like it without further
25 meet-and-confer where you might work this out, or whether you

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1 want it just based on what's in the letter here.

2 MR. LIMAN: Second, your Honor, I have an urgent
3 criminal matter in the Eastern District of New York at 4
4 o'clock. Maybe I should have started off with that.

5 THE COURT: Yes, maybe.

6 The problem is going to be, you and your colleagues
7 who have not only this 29-page joint letter but then, you know,
8 two or three inches of supplemental letters are going to run
9 out of time. I don't care.

10 MR. LIMAN: We're happy for your Honor to decide this
11 on the papers. We are also happy to do a telephone conference,
12 come back tomorrow --

13 THE COURT: That's a possibility. But let's just deal
14 with this.

15 How would you suggest limiting this?

16 MR. LYTTLE: I would suggest a limitation to the
17 parties they have identified, which we have first seen in this
18 letter, as well as a limitation to documents that relate to Rio
19 Tinto's decision to enter into the settlement agreement and to
20 credit their cost/benefit discussion, the documents with third
21 parties that relate to the cost benefit, and the parties have
22 agreed to a definition of what that means because it comes up
23 in other requests.

24 What I'm not willing to agree to is a broad any
25 document mentioning the settlement agreement.

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1 THE COURT: OK. Mr. Liman, does that work?

2 MR. LIMAN: Your Honor, I think in addition to the
3 categories that were mentioned, we think it should encompass --
4 and it's not going to be a huge volume -- all of the
5 correspondence with the third parties, external correspondence
6 that referenced the settlement agreement.

7 So if there is correspondence with Chalco or with IRC
8 that references the settlement agreement that can be searchable
9 by the address --

10 THE COURT: By correspondence you are including
11 e-mail, which gets us back into the huge volume?

12 MR. LIMAN: I don't think it does, your Honor, because
13 we understand internal e-mails with respect to this subjects
14 that were mentioned, and then we are looking for -- it probably
15 should cover similar categories -- any external e-mails on the
16 subject of the settlement.

17 THE COURT: Mr. Lyttle, limited to external, is that
18 acceptable?

19 MR. LYTTLE: Your Honor, we can make that acceptable.

20 THE COURT: Good.

21 Does that apply to 63 as well, or do we have different
22 issues on 63?

23 MR. LYTTLE: Unfortunately 63 presents a different
24 issue.

25 THE COURT: OK. What is it from your point of view?

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1 MR. LYTTLE: The April to 11 settlement agreement
2 created a new project over blocks three and four. It set a
3 number of milestones, production milestones, development
4 milestones. All of those milestones, they now want extensive
5 discovery into how those milestones were being met or not met.
6 Our position, your Honor, is that that is all post-settlement
7 work.

8 Let's credit their theory just for purposes of
9 argument. If we weren't meeting those milestones, it presented
10 no threats to our rights to blocks one and two. It would only
11 present a threat to our rights to blocks three and four.

12 There's been extensive development work on 3 and 4,
13 extensive, that we don't think is relevant. It is not called
14 for. This request is again completely unmoored to the concept
15 of the why did you enter into the settlement agreement.

16 THE COURT: I got your point.

17 Mr. Liman?

18 MR. LIMAN: Your Honor, first I think, just to be
19 clear, what we're looking for in 63 is documents provided by
20 Sinfur, that's Rio Tinto, to the government of Guinea. So we
21 are not looking for everything that references.

22 Second, to make it --

23 THE COURT: Stop for a minute. Provided when?
24 Presettlement agreement or post or both?

25 MR. LIMAN: Both, but limited to the categories that

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1 follow the word "including."

2 And, your Honor, if I could address the relevance
3 briefly. The relevance is that our theory of the case is that
4 the settlement agreement was a positive for Rio Tinto. All of
5 these documents will demonstrate that this was a deal not to
6 give up Simandou one and two, but to get Simandou three and
7 four that made money for Rio Tinto.

8 That's the relevance.

9 The burden, since it's described in the documents that
10 are required to be produced pursuant to the agreement and just
11 external, should be nonexistent.

12 MR. LYTTLE: Your Honor, we have agreed in response to
13 numerous other requests to give them all correspondence with
14 the Guinean government about why to enter into the settlement
15 agreement. If you look at what that their request is, it is
16 calling --

17 THE COURT: This is postsettlement agreement.

18 MR. LYTTLE: Postsettlement agreement.

19 -- for geological drilling data, business plans --

20 THE COURT: How much data did you have give the
21 government?

22 MR. LYTTLE: Your Honor, it is not exactly clear to
23 me. We are trying to find that out. There was a lot
24 developed -- I'm sorry. I don't have an answer for your Honor,
25 is the short answer.

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1 THE COURT: It is hard to say that the burden is great
2 if you don't know what it is. Presumably you are going to do
3 this based on either e-mail or other cover correspondence
4 saying, "dear government, attached is . . ." or you are going
5 to rely on your client saying this is what we gave the
6 government to the best of our recollection.

7 So at this point, I will enforce request 63. If you
8 tell me that when you do that search either you can't figure it
9 out at all, in which case is answer is probably you don't have
10 to produce anything, or you know there are a billion documents
11 we'll revisit the issue.

12 MR. LYTTLE: May I briefly clarify, your Honor?

13 THE COURT: Very briefly.

14 MR. LYTTLE: Just to be clear, that is what was sent
15 to the Guinean government only as Mr. Liman represented?

16 THE COURT: Correct.

17 MR. LYTTLE: Thank you.

18 THE COURT: All documents provided to the government.

19 MR. LYTTLE: Thank you, your Honor.

20 THE COURT: Next we go over to page 13, Rio Tinto's
21 custodians, and you want to add two more people.

22 Their response, of course, is in part that means they
23 should get people added on your custodian list, and there is
24 some fairness to that suggestion.

25 So why are these two so important that if you get it

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1 you may wind up having to add people to your custodian list?

2 MR. LIMAN: Your Honor, they are so important because
3 the sole theory of RICO injury that remains in this case is the
4 settlement agreement.

5 We have two custodians that have been identified by
6 them. We are asking for two more custodians in a case where
7 billions of dollars is being sought in damages. This is
8 critical information for us.

9 THE COURT: Didn't you have this information from the
10 beginning?

11 MR. LIMAN: We did not, your Honor. We absolutely did
12 not.

13 If your Honor would look at page 7 and 8 of the joint
14 letter, those lay out what we had and what we didn't have.
15 What we had was a theory of the case that depended on 2008 and
16 2009.

17 THE COURT: Your argument is they changed their
18 argument.

19 All right. I'm inclined to give them these two
20 additional custodians, Mr. Lyttle. And the quid pro quo may
21 well be when you are arguing that you get more custodians than
22 you do, but tell me why I shouldn't.

23 MR. LYTTLE: Your Honor, just very briefly, these
24 custodians we believe are cumulative. One of them is another
25 in-house counsel.

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1 THE COURT: If it's cumulative that is going to make
2 it pretty easy, because you are going to dedupe.

3 MR. LYTTLE: Still the collection and the processing,
4 your Honor. Fair enough.

5 Last but not least, I won't belabor it, but it really
6 to us is shocking that they would basically not have documents
7 or custodians we have lost and now they want to add more.

8 THE COURT: I understand.

9 MR. LYTTLE: All right.

10 THE COURT: All right. Add the two new custodians,
11 Laura Granson and Benoit Palmer.

12 MR. LYTTLE: Your Honor, those two custodians are
13 limited to these requests?

14 THE COURT: Yes. Third requests. That's what the
15 request is. That's what they get.

16 MR. LYTTLE: Thank you, your Honor.

17 THE COURT: OK. Next.

18 Rio Tinto's oral litigation hold.

19 MR. LIMAN: I'm just confirming something with
20 Mr. Lyttle.

21 THE COURT: I understand.

22 MR. LIMAN: Just to clarify for the record, what we
23 just discussed is that with respect to the two additional
24 custodians. It will be everything in the third request? Not
25 just 62 and 63, but everything in the third request?

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1 THE COURT: Correct.

2 MR. LIMAN: Thank you, your Honor.

3 THE COURT: OK.

4 I am not a big fan of discovery about discovery. I've
5 got two supplemental letters, maybe it's one supplemental
6 letter, two copies of it adding to the pile on this issue. It
7 seems there is a lot of information here.

8 What else do you want, Mr. Liman?

9 MR. LIMAN: Your Honor, I think if you look at our
10 letter of June 1, we lay out on page 2 in a series of bullet
11 points --

12 THE COURT: Hang on while I find your June 1 letter.

13 You don't mean the joint letter?

14 MR. LIMAN: I don't, your Honor.

15 THE COURT: You mean the supplemental?

16 OK. Got it. I think. This is the one that says the
17 discovery requests relevant to the statute of limitations?

18 MR. LIMAN: No, your Honor, it's not.

19 THE COURT: I've got a gazillion letters from all of
20 you. Why don't you hand me what it is.

21 OK. So is it mostly getting from fall of 2010 to an
22 exact date?

23 MR. LIMAN: Fall of 2010 to an exact date, and then
24 whether the oral hold covered the bullet points that are on the
25 bottom of page 2 and 3 and whether it didn't.

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1 THE COURT: OK. Mr. Lyle.

2 This all seems much ado about nothing on both sides.

3 MR. LYLE: Yes, your Honor.

4 The fact is our oral hold, as we've told them and
5 advised them -- and in fact we told them as early as March of
6 this year that it encompasses Simandou, which encompasses
7 everything that they have put in their letter.

8 THE COURT: How about a date?

9 MR. LYLE: We can give them dates, your Honor.

10 THE COURT: Good.

11 What else, Mr. Liman, on that issue?

12 MR. LIMAN: Can we have a deadline of some type for
13 when we'll get it?

14 THE COURT: Wednesday.

15 Mr. Lyle?

16 MR. LYLE: Can we make it by the end of the week, your
17 Honor.

18 THE COURT: Sure.

19 MR. LYLE: Thank you.

20 THE COURT: OK.

21 Next, status of Rio Tinto's document production.

22 I think there is nothing you want me to rule on that.
23 That is informational, is that correct?

24 MR. LIMAN: That's correct, your Honor.

25 THE COURT: All right. We are going to hold off on

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1 the investigator issue and now go to the discovery from Vale.

2 I am not inclined --

3 MR. LIMAN: Your Honor, Mr. Reents will be handling
4 that.

5 THE COURT: It seems to be an issue of additional
6 custodians and a 30(b)(6) witness. I'm disinclined to give the
7 30(b)(6) witness. I may be inclined to give the additional
8 witnesses.

9 So, Mr. Reents, why don't you perhaps respond.

10 MR. REENTS: Your Honor, the main thing, the main
11 issue here is just that -- this is the same issue that they
12 presented at the last conference. There's no new information
13 that they have received since that conference that should cause
14 you to reconsider your decision then, which is that you allowed
15 one additional custodian, Mr. Ricardo Saad, and denied their
16 request for additional custodians beyond that.

17 They have had all the information they needed at that
18 conference to request additional custodians. They didn't.
19 There are no issues here.

20 THE COURT: Mr. Lyle?

21 MR. LYLE: Your Honor, just for clarity, are we simply
22 arguing about the custodians at the moment. I would like to
23 address the 30(b)(6) deposition as well.

24 THE COURT: First of all. The custodians I think I
25 did rule on. Why should I revisit that?

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1 MR. LYLE: Your Honor, because we have demonstrated to
2 you, which is something that we did not dig into at that time
3 of the last hearing, that these witnesses are witnesses that
4 Vale has identified as having relevant information. As you
5 will recall, there are eight custodians for whom --

6 THE COURT: Identified in what way?

7 MR. LYLE: In responses to their -- in the discovery
8 requests, your Honor, they have identified as having the
9 information responsive to the allegations in complaint.

10 THE COURT: How is that different than what we
11 discussed last time, where they said they spoke to all the
12 administrative assistants and surviving people and blah blah
13 blah, and that nobody else was likely to have relevant
14 information.

15 It may be you have made a better argument here than
16 you did last time, but I'm inclined to deny it, unless you're
17 telling me this information you are now giving me is
18 information you didn't have at the May 8 conference, in which
19 case I don't like doing these things in pieces.

20 MR. LYLE: We also received the fact that these
21 witnesses are identified in their lit. hold.

22 THE COURT: So what?

23 MR. LYLE: Because those are individuals who are in
24 the custodians that they've self-identified as having
25 information that should be --

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1 THE COURT: People usually overdo. If they didn't put
2 everybody and their mother on the lit. hold, you would be
3 arguing spoliation, etc.

4 The mere fact that they put someone on a lit. hold is
5 not sufficient that they have documents that are not peripheral
6 or duplicative, etc. Preservation is much broader than
7 production.

8 MR. LYLE: Understood, your Honor.

9 But we have now the identification of them by Vale as
10 responsive. We've lost eight custodians because they destroyed
11 their documents. We are looking --

12 THE COURT: Seven in the sense that I gave you one
13 extra custodian last time.

14 Here's what we are going to do.

15 MR. LYLE: We are requesting the quid pro quo that we
16 talked about, your Honor.

17 THE COURT: The quid pro quo you are going to get.
18 You get one more custodian, so that the one I gave you last
19 time and the one I give you this time equals the two they're
20 getting from you. It's silly, but so be it. Tell me who you
21 want of the ones you look at here, or are you can tell them
22 later.

23 Your choice.

24 MR. LYLE: We will identify one later.

25 THE COURT: That is fine.

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1 On the 30(b)(6) witness, at this stage I am denying
2 the request. If, after seeing their document production, you
3 can point to holes or missing evidence or the like, I will
4 consider it at that point.

5 MR. LYLE: Your Honor, if I may be heard.

6 they have identified three custodians for whom a
7 litigation hold was in place and for whom documents were not
8 maintained in the form of e-mails on the backup tapes.

9 That is new information that we have learned since the
10 last hearing, when you directed them to answer all of the
11 questions that we've submitted.

12 Under the *Zubulake* decisions we are entitled to pursue
13 this issue, to understand why it is that those documents are
14 missing. Because we are entitled to --

15 THE COURT: At the moment we don't know the documents
16 are missing. We know that certain material was not held.

17 It may be, because there are usually two parties to an
18 e-mail, that you are getting all the information.

19 So I will give you a choice. If you push it, I will
20 make a ruling now. You may win, you may lose. But I won't
21 revisit it at the end.

22 Or you can wait and we'll see what the document
23 production is. The 30(b)(6) witness isn't going away. That is
24 an issue as to what happened in the past that they will have to
25 deal with, and I'll worry about ruling on it at the time when

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1 you have a complete record so I'm not doing this in pieces.

2 What is your choice? If I rule on it now, you may
3 win, you may lose, but I am not going to do it again.

4 MR. LYLE: Your Honor, if I could just give you a
5 clarification on a fact. What we don't have is the
6 communications among the eight custodians. All of the tapes
7 have been destroyed, including the hard drives.

8 THE COURT: What's the 30(b)(6) witness going to tell
9 you?

10 MR. LYLE: The 30(b)(6) witness is going to explain to
11 us, we are going to focus the discovery on why the backup tapes
12 were not maintained.

13 THE COURT: Again, do you want me to rule on the
14 current record with no revisiting win, lose or draw, or do you
15 wish to hold it until you see the full production and have a
16 better argument that indeed internal communications were not
17 produced amongst the eight, etc., etc.? Your choice.

18 MR. LYLE: So you are giving us a chance to look at
19 the production, determine what may or may not be missing, and
20 then come back to you with a fuller record?

21 THE COURT: That's right.

22 MR. LYLE: On this exact issue?

23 THE COURT: That's right.

24 MR. LYLE: We will defer, your Honor.

25 THE COURT: All right. Nardello report. When are we

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1 going to get an answer?

2 MR. LIMAN: Your Honor, the deadline is June 9. If
3 your Honor wants it earlier --

4 THE COURT: Why is it June 9.

5 MR. LIMAN: Under your Honor's rules, we have looked
6 at the two weeks.

7 THE COURT: It is a discovery issue, not a formal
8 motion. That means it's like three days or five days, whatever
9 the local rules say.

10 MR. LIMAN: We will put in something by the end of the
11 week.

12 THE COURT: OK. I will tell you now that, for
13 whatever it's worth, my inclination is they've got an affidavit
14 saying that either somebody who is a neutral or is, at least
15 for them, one of their consultants, employees, saw the
16 information. That, seems to me, is ballgame over unless you've
17 got a counter affidavit that says we never saw this guy, he is
18 a total liar, and then I don't know what I do with those
19 conflicting affidavits.

20 MR. LIMAN: We are not going to put in an affidavit
21 that says that, but we will put in an affidavit or affidavits
22 that establish that under the applicable law there is no waiver
23 of the privilege here.

24 Your Honor, we are also, frankly, considering the
25 question of whether, if we could confine the scope of it to

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1 just produce the Nardello report, given the contents of it and
2 the points that it makes. That's one of the things that's
3 under consideration.

4 THE COURT: I will certainly allow you to produce the
5 Nardello report without waiver under the equivalent of 502(a),
6 that it's not a subject matter waiver, or at least that you
7 will both be arguing how much further they can go into it, and
8 whether they want to make it a cause celebre as you guys are
9 doing with their investigator reports. But I would suggest
10 that you seriously consider producing it.

11 MR. LIMAN: Thank you, your Honor.

12 THE COURT: OK. Now I think we're up to Rio Tinto's
13 second request to Vale.

14 MR. LIMAN: Mr. Karlan will address any questions that
15 your Honor has.

16 THE COURT: OK.

17 Other than they are narrowing prior requests, other
18 than serving new requests, if the narrow request is one you are
19 willing to abide by, I'm not sure why we have to stand on
20 formality.

21 I said I'm not rewriting their requests, but, you
22 know, does it really matter whether that constitutes a new
23 request or not outside time limit? It just means they'll get
24 the documents 30 days later or whatever.

25 So, with that.

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1 MR. KARLAN: Your Honor, Matthew Karlan for Vale. I
2 think the issue is more substantive than that.

3 Taking the first request as an example, they purported
4 to limit it. I think it's still essentially a request for
5 competitive intelligence about local conditions in Guinea. I
6 think that is, as your Honor ruled last time, far broader than
7 would be relevant.

8 I would also note some ambiguity in what the request
9 says. Certainly the first part is very broad. It is
10 essentially limiting it to one of two primary candidates. I
11 don't think that's any less broad than saying all candidates.

12 There is a suggestion in the letter also that we have
13 agreed in the predictive coding process to mark similar
14 documents as responsive. I think for us that is an odd
15 complaint.

16 They are also complaining in the letter that we are
17 being too narrow. I am not sure how to reconcile those. I
18 think the point is that, with respect to that specific
19 document, we agreed that it would be responsive. I don't know
20 why that forms a basis for expanding the scope of the request.

21 THE COURT: Let's limit it to Vale's perception of how
22 Mr. Condé's candidacy, or I guess really his election would
23 impact your mining rights.

24 Is there really a tremendous amount of documentation
25 on that subject?

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1 MR. KARLAN: Respectfully, your Honor, we don't know
2 for sure until we look. I would suggest that the more relevant
3 scope would be slightly narrower than that. They have
4 suggested the reason it is relevant is that he was coming to
5 power on a platform of reform.

6 If there are documents indicating that, as they are
7 suggesting, that Vale was concerned about that because they
8 were aware that there was prior bribery by the joint venture
9 partner that would be potentially discovered, I think we never
10 disagreed that would be discoverable.

11 THE COURT: Except you are already obligated to
12 produce all information about possible misconduct by other
13 defendants. So that's saying they can have ice cubes in a
14 snowstorm or whatever.

15 MR. KARLAN: Our point, your Honor, is that would be
16 the relevant scope if there's nothing other than that.

17 THE COURT: I am not sure how else his candidacy might
18 have affected your rights.

19 Why don't you see what's there. In other words,
20 search for it, and if you determine either that there is so
21 much or that there isn't very much but it's not really on point
22 we can revisit the issue.

23 As of now, your arguments seem to be too much
24 hypothetical. So that's for that one.

25 Now, 56 and 63, are you searching for documents about

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1 this February and/or May meeting? I know you say the May
2 meeting doesn't exist.

3 MR. KARLAN: I think that the issue is similar. It's
4 not an issue as to whether meetings occurred. Your Honor said
5 we are not going to stand on the formality of a new request,
6 but we did look into those specific meetings reported back to
7 your Honor at the last conference.

8 I think as we have set out in the letter, we actually
9 believed all of these had been resolved as of the last
10 conference. We disagree with the statement in the letter that
11 we agreed to hold them in abeyance. That is not correct in our
12 view.

13 But we did due diligence on these issues. We reported
14 back both to Rio Tinto and to the Court to that. As we have
15 previously reported, we don't believe that those meetings are
16 relevant to the issues in the case.

17 I think the concern beyond that -- I mean, it is not
18 just a burden concern -- the issue is that we are competitors.
19 These are meetings with the government. There is a tender
20 coming imminently apparently.

21 While there might be documents in there that are
22 responsive to the agreed-upon scope of the request that we
23 would have to produce, for instance, discussing the topics we
24 have just mentioned in terms of bribery, if there are others
25 that go to sensitive commercial topics, there's no reason to

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1 produce them.

2 THE COURT: All right. I agree with that. But again
3 your search for these has to be concepts, not bad buzzwords.

4 So they are not entitled to what was discussed if it's
5 not related to the allegations here of fraud, etc., etc., but
6 it's not limited to looking for bad buzzwords.

7 MR. KARLAN: I understand that, your Honor.

8 I would point out before Mr. Lyttle speaks that we
9 have resolved all of the disagreements we have had in terms of
10 the coding, the disclosures we have made with predictive coding
11 so far. I think that is the protection that is there for them
12 on that front.

13 They have objected to documents they felt were coded
14 incorrectly, and we resolved those. So I think that's a
15 correct way to go about it.

16 MR. LYTTLE: Your Honor, real quick. We could make
17 sure that 56 would also encompass -- the timing of this is very
18 important. This meeting with their CEO is right after
19 President Condé, who has been ushered in on a platform of
20 reform, this is that first meeting. We would like to know if
21 President Condé is saying: We are going to be investigating
22 you. We are going to be investigating this.

23 THE COURT: Investigation counts. That is similar to,
24 you know, there's fraud or there may be fraud.

25 MR. LYTTLE: Right.

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1 THE COURT: We love the fact that you are earning us
2 billions of dollars or whatever, that we want you to mine
3 deeper, faster, that is off the table.

4 OK. Let's move on. We are running out of time.

5 62 and 65 I am not sure I understand what you are all
6 fighting about here.

7 MR. LYTTLE: Your Honor, we skipped 63, if I may. All
8 we are asking for is there --

9 THE COURT: It is the same issue.

10 MR. LYTTLE: We are asking them to tell us -- they
11 have said there's no May 2011 meeting between their CEO, but
12 they alluded that there were other meetings. We just want to
13 confirm when there are meetings with the Guinean government,
14 they will look for these types of documents.

15 MR. KARLAN: That's correct.

16 THE COURT: Good.

17 62. Internal discussions, legal risks of the joint
18 venture.

19 What is the fight here?

20 MR. LYTTLE: Your Honor, the fight is they are saying
21 this is look-back diligence. We have told you that doesn't
22 apply.

23 It is broader than that. We are looking for documents
24 that evaluated the proprietary, the risks of entering into a
25 joint venture with the company like BSGR and Mr. Steinmetz.

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1 MR. KARLAN: Your Honor, I think the issue is to the
2 word propriety. If there are documents reflecting due
3 diligence, which we have agreed to produce by the way,
4 nonprivileged documents concerning due diligence, that reflect
5 the legal risks, for instance, FCPA risks, those, if they are
6 not privileged, are going to be produced.

7 Propriety is a word that can means lots of things,
8 including risks that are not of the type that relate to this
9 case.

10 THE COURT: You two can't figure out a definition of
11 propriety that you both can live with that I have to rule?

12 MR. KARLAN: Frankly, your Honor.

13 THE COURT: At this stage of the case? Really?

14 MR. KARLAN: I think that the correct definition would
15 be some version of legality. If we need to expand upon what
16 that means, we would be happy to do that.

17 But I don't see that propriety adds that would be
18 within the scope.

19 MR. LYTTLE: We will talk to them, your Honor, as long
20 as we have -- it would help us to get a ruling from you that
21 information looking into how, however we define it,
22 proprietary, legality, risk, Vale is looking at doing this
23 venture not just from a legal perspective from a reputational
24 perspective is relevant. Then we will work on the words.

25 THE COURT: Does that work?

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1 MR. KARLAN: I am happy to talk further, your Honor.

2 THE COURT: All right.

3 Anything having to do with when you lie down with dogs
4 you get fleas, to be colorful about it, that is what we are
5 talking about.

6 OK. Whatever words you want to use define it, fine.

7 The force majeure with BSGR, 65. What is this all
8 about?

9 MR. LYTTLE: They declared force majeure. They ended
10 the contract and we want to know why.

11 MR. KARLAN: Your Honor, they have documents
12 concerning that that have already been produced because they
13 are in the DOJ production.

14 I don't believe any of those documents indicate that
15 the reason for that relates to the bribery, corruption, etc.
16 If that were the case, we agree those documents would be
17 relevant, responsive and would be produced

18 if they don't, they are not relevant and they should
19 not be.

20 MR. LYTTLE: Your Honor, relevance in this case is not
21 limited to bribery or corruption and it's not limited to
22 documents that they hand selected to produce. Our request in
23 our discovery is broader than that. We want to know why.

24 THE COURT: I understand. But if they decided to get
25 out of the with BSGR because they were losing money or

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1 whatever, you are not entitled to that. Only if they get out
2 of it because they discovered that something bad was happening
3 or had happened with BSGR.

4 MR. LYTTLE: If they are losing money because it is
5 under investigation by six foreign countries, if they are
6 losing investigation --

7 THE COURT: If they say it's because there are
8 investigations, you get it.

9 I think my ruling is clear. We are moving on.

10 Vale's training of its predictive coding system. I
11 think we have already taken care of that.

12 MR. KARLAN: Your Honor, if I could lay a marker with
13 respect to request No. 64.

14 THE COURT: I thought you all agreed on 64.

15 MR. KARLAN: That's what I wanted to raise, your
16 Honor. There is a footnote in the letter. It is on page 24.
17 It's footnote 22.

18 It could be read to mean that we have agreed to the
19 request as written. That is not correct. It refers to a
20 conversation we had on the record at the last conference where
21 we discussed possibly the mutual exchange of board minutes.
22 That would not indicate that we agreed to the scope of the
23 request as written, which is their --

24 THE COURT: OK. I got you.

25 The predictive coding system is that all resolved by

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1 my ruling on synthetic documents?

2 MR. REENTS: I think that was an FYI point raised by
3 Rio Tinto.

4 THE COURT: If it's FYI, I am not dealing with it.

5 OK. The London High Court issue, also informational
6 on page 28. Yes?

7 MR. FILARDO: Yes, your Honor, it is. Good afternoon.

8 Just one quick update. We learned on Friday that
9 Master Eastman of the London High Court did issue an interim
10 ruling whereby he set down that application for hearing on June
11 12 and then stayed all responses given that ruling.

12 THE COURT: OK. Is that because of the extension
13 request?

14 MR. FILARDO: It is because of the extension request,
15 your Honor. Essentially it was a modification of the order
16 that was issued which didn't comply with the parties' agreement
17 to produce all documents by June 30.

18 THE COURT: All right. And Onyx --

19 MR. FILARDO: That's the same for the Onyx
20 application, your Honor.

21 THE COURT: OK.

22 BBG documents --

23 MR. LYTTLE: Your Honor, before we --

24 THE COURT: Yes.

25 MR. LYTTLE: On the BSGR and Steinmetz, Vale has been

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1 very good about forwarding information about how that's going
2 with us.

3 We did cooperative work on those. I would ask that
4 Mr. Steinmetz of BSGR also forward correspondence and
5 communications and correspondence about how they are
6 progressing to us.

7 THE COURT: So ordered on consent.

8 MR. FILARDO: Your Honor, I will pass these to counsel
9 right now. He's received it today.

10 THE COURT: BBG documents.

11 MS. NEISH: Your Honor, Laura Neish for BBG. There
12 was a delay earlier this year with respect to the documents in
13 storage. That was caused by the fact that ownership of BBG
14 changed hands, and there was some confusion as to who on the
15 ground over at Guinea was handling that process. We resolved
16 that now, and the production is moving forward and we
17 anticipate being able to make the discovery deadline.

18 THE COURT: Of June 30?

19 MS. NEISH: Correct.

20 THE COURT: OK. Good.

21 the documents that you are waiting for from the
22 Guinean government?

23 MS. NEISH: No further progress on that. We don't
24 have any objection to producing them if and when the Court
25 releases them.

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1 MR. LYTTLE: We would just ask -- we understand they
2 are working hard and we appreciate that. If we could ask for
3 relief from the June 30 for that discrete -- because those were
4 subject to the original request.

5 THE COURT: If they can do it by then, great. If they
6 can't, nobody is going to be able to say I couldn't do it by
7 June 30 so I don't have to do it once you are freed by the
8 Guinean government.

9 MR. LYTTLE: Thank you, your Honor.

10 THE COURT: Now, supplemental letters.

11 Let's see what we have here. We are putting a pin in
12 Nardello.

13 I don't know what that leaves, Mr. Liman.

14 MR. LIMAN: I think that leaves the motion with
15 respect to the investigative firms.

16 I think we need two things with respect to that. One
17 is a date for the opposition from Rio Tinto.

18 The second is Rio Tinto raised with us just before we
19 came into court today that some of the attachments on the
20 motion, the agreements with the investigative firms that
21 they've designated as highly confidential. We fail to see how
22 they would qualify for that.

23 But, in any event, we will take it up however your
24 Honor wants to, either get the exhibits filed under seal or to
25 raise with the Court.

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1 THE COURT: Go through the ECF help desk, pull the
2 letter, file it. The letter without seal, with the attachments
3 under seal. If you need an order to be able to do that, the
4 two of you jointly submit something for my signature.

5 MR. LIMAN: Thank you, your Honor.

6 THE COURT: Now, I want to prove you I read footnotes
7 so let me raise one footnote-related question to the June 1
8 letter.

9 Mr. Lyle and Mr. Lyttle, where it says footnote 2,
10 page 3, Rio Tinto has neither confirmed nor denied whether it
11 has any of these documents, do you want to confirm that you
12 don't have any of the documents that we're fighting about?

13 MR. LYTTLE: Your Honor, I'm sorry we had planes,
14 trains, and automobiles to get here this morning with the
15 weather. I haven't had a chance to read this carefully.

16 THE COURT: Just read footnote 2 to start.

17 MR. LYTTLE: I'm sorry. I don't see a footnote 2 on
18 the June 1 letter. Mr. Liman handed us a copy when we came in
19 the door. It's probably their huge one they filed. They got
20 that one in the taxicab.

21 We haven't seen it, your Honor. I'm happy to read it.

22 THE COURT: Does one of you have a copy to give him.

23 There we go.

24 MR. LYTTLE: Oh, all right.

25 THE COURT: It's dealing with the investigator

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1 material, and they are saying you have neither confirmed or
2 denied that you don't have any of the investigator-related
3 documents.

4 I would like a confirmation that you don't have any of
5 them.

6 MR. LYTTLE: Your Honor, we do not have any of the
7 materials they are seeking beyond the reports themselves,
8 invoices, and engagement letters, all of which have been
9 produced, except for the invoices. We don't have what they are
10 seeking in our possession.

11 MR. LIMAN: Your Honor, we don't have any of the
12 invoices. If they are saying they've got the invoices, that is
13 part of what the motion is addressed to.

14 THE COURT: OK. Produce the invoices.

15 Produce whatever you have that you haven't produced
16 with respect to the investigators.

17 Clear?

18 MR. LYTTLE: Yes, your Honor.

19 THE COURT: Good.

20 If you have produced the invoices and Mr. Liman
21 doesn't remember seeing them, just tell him the Bates numbers
22 or how to find them.

23 MR. LYTTLE: Just for the record, the request for the
24 invoices was served under the second set of requests in March,
25 so we are actually in the process of collecting those, and we

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1 will absolutely be providing those.

2 THE COURT: Rio Tinto does not have any other
3 documents about the investigator reports, is that correct?

4 MR. LYTTLE: We do not, your Honor.

5 THE COURT: OK.

6 Next, flipping over to page 5.

7 A presumption or assumption is that you are paying the
8 investigator firms' legal or other expenses. It is at the very
9 bottom paragraph, it looks like the fifth line, where it says,
10 "Each one of them lawyered up, (presumably at Rio Tinto's
11 expense)."

12 MR. LYTTLE: Your Honor, we are neither indemnifying
13 nor paying any of their expenses.

14 THE COURT: That's what I thought.

15 So I guess my question to Mr. Liman is this. Two
16 things: One, at least in the UK, you've got a chance, probably
17 a good one, despite the objections and maybe not by June 1 or
18 June 15 or even June 30, but there is a good chance you are
19 going to get material from the letters of request at least in
20 the UK. If I start ruling on this issue now, that may or may
21 not interfere with that.

22 Do you want to put a pin in this and let at least the
23 UK if not South Africa run its course before getting a ruling?

24 That's question number one.

25 MR. LIMAN: The answer is yes, we would.

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1 What we would suggest is that your Honor receive the
2 briefing on this issue and then --

3 THE COURT: I don't know. I certainly don't think I
4 need any more briefing from you. I am not sure that I need any
5 more briefing from them. But if you are saying I don't have to
6 do anything until after my colleague and counterpart in the UK
7 rules, I am more than happy to put it off, and you will put it
8 on the agenda for another conference.

9 MR. LIMAN: What I would suggest is that we keep your
10 Honor informed of the process, and then at some point your
11 Honor will have the fully briefed motion.

12 We just didn't want there to be delay. That's why we
13 brought it to you.

14 THE COURT: I assume the plaintiffs have no objection
15 to that.

16 MR. LYTTLE: No, your Honor.

17 MR. LIMAN: Your Honor, we do think it would be
18 worthwhile to have the application fully briefed, however much
19 time they need, so that if the time comes when -- let me tell
20 you the concern that I've got.

21 If we report to your Honor that the process is being
22 frustrated abroad, then Rio Tinto is going to ask for
23 presumably a week or two to put in its papers. It may take
24 some time to get the conference before your Honor. If we could
25 just simply both agree to submit the papers, your Honor would

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1 hold it in abeyance. I think, given the tight timetables we
2 are under in front of Judge Berman, that would ensure that the
3 trains keep moving as best we can.

4 THE COURT: You know, I think, not to get ahead of
5 ourselves, but the other request I have for you, which you can
6 think about now and maybe answer, is what good is it going to
7 do if I rule that this is in their possession, custody, or
8 control under operative Second Circuit law and their practical
9 ability when it is clear that, at least so far, the
10 investigative firms have largely said, but not entirely --
11 particularly those that are subject to UK jurisdiction as
12 opposed to other countries that don't know anything about
13 discovery -- where, some at least, of the investigative firms
14 have said the heck with you we've got our own interests and
15 we're not complying?

16 MR. LIMAN: Your Honor, I think Judge Kaplan gave the
17 answer to that.

18 My experience is, and I think the Court's experience
19 is that when a party says I've got an order from the Court
20 saying I have to produce this material, deliver it to me, I
21 demand that you deliver it to me so that it can be produced,
22 and if not, there are enforcement mechanisms to make sure I've
23 done everything possible to get it, that has a way of
24 clarifying people's minds.

25 THE COURT: I have the feeling that the very argument

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1 you have made about Rio Tinto has made in your view its
2 position that it doesn't want this complied with, you know,
3 known to the investigators, that the next letter they have to
4 send if I rule in your favor that says, no kidding around now,
5 the judge has ordered me to produce this or I'm going to face
6 penalties, I don't know that that's going to have any better
7 result than what I thought we were doing here, which was a
8 letter saying the Court wants me to get this, please give it to
9 me, and at least several of the investigators said go away
10 don't bother me.

11 MR. LYTTLE: Your Honor may I be briefly heard.

12 THE COURT: Sure.

13 MR. LYTTLE: Judge Kaplan's decision in *Auction Houses*
14 is not repeatedly on point there. In that case --

15 THE COURT: Don't argue that issue now.

16 MR. LYTTLE: We have no leverage, like they had in
17 *Auction Houses*. I won't get into the details. All Judge Kaplan
18 said was exert whatever leverage you have under a settlement
19 agreement or a separation agreement as well as a defense
20 cooperation agreement. We have neither. We have no leverage
21 under those agreements.

22 THE COURT: Am I correct that as to all of these
23 investigative firms none of them -- that may be too many
24 negatives. Are any of these investigators under any sort of
25 current relationship or contract with Rio Tinto?

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1 MR. LYTTLE: I thought about it on the way in, your
2 Honor. I need to check on that. I am not in a position to
3 confirm that. I will do so.

4 MR. LIMAN: Your Honor, I think you have previously
5 ordered Rio Tinto to produce to us the correspondence with the
6 investigative firms. We still have not received that. We've
7 received some -- the most recent letters, but they have made
8 reference to the fact that there were e-mails and other types
9 of correspondence.

10 Your Honor ordered it. We are just asking that your
11 Honor's order be complied with.

12 MR. LYTTLE: You didn't order that, your Honor.

13 THE COURT: Whether I did or didn't, any reason you
14 shouldn't produce whatever the prior e-mails or correspondence,
15 whether from your firm or Rio Tinto to the investigators during
16 the course of this attempt to find out the sources and backup
17 information?

18 MR. LYTTLE: We can turn that over.

19 THE COURT: Good. Do it by the end of the week.

20 Is that doable?

21 MR. LYTTLE: Your Honor, on the investigators,
22 literally in the car on the way here we did receive a
23 production from one of the investigators.

24 I actually had my colleague in the New York office
25 print it off so I was able to bring it. It is a response

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1 letter as well as production material. So I think this
2 belies --

3 THE COURT: Which investigator?

4 MR. LYTTLE: Mr. Tiddian Torre.

5 I think this belies the position that Vale has
6 repeatedly taken that we don't want this, that we have
7 discouraged this. That is absolutely not the case. And here
8 is an investigator turning over what he has.

9 THE COURT: OK.

10 MR. LYTTLE: Your Honor, one other point.

11 THE COURT: Yes.

12 MR. LYTTLE: In this letter -- my French is not very
13 good -- he does make reference that there may be additional --
14 he's not sure, but there may be additional political or
15 monitoring reports.

16 Those type of political monitoring background reports
17 are the subject of a recent request that we have been
18 discussing with them. We are going to look for them. If we
19 have them, we will produce those.

20 THE COURT: Good.

21 MR. LYTTLE: Would you like a copy of that, your
22 Honor.

23 THE COURT: Absolutely not.

24 MR. FILARDO: I would like a copy, your Honor.

25 THE COURT: OK.

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1 I assume that that has taken care of all issues on the
2 table, corresponded about or not, correct?

3 MR. LIMAN: Your Honor, I assume with respect to the
4 motion -- how would you like us to handle it?

5 THE COURT: I am going to require you to brief it very
6 quickly at the time. I don't think it's useful to have that
7 brief now. First of all, the factual aspect of it may change
8 as some of them produce. I assume, however, that whether it's
9 the senior master in the UK or his equivalent in other
10 countries asks Rio Tinto's position, you certainly agree that
11 that information should be produced, correct?

12 MR. LYTTLE: If they want to produce it, we have no
13 problem with them producing it, correct.

14 THE COURT: Good. OK.

15 That will suffice for now.

16 You all, Mr. Liman through your British or other
17 colleagues can make that information known to the powers that
18 be over there.

19 When do you all want to come back?

20 MR. LIMAN: A suggestion has been made of three weeks,
21 your Honor, or four weeks.

22 THE COURT: You have the choice of up to June 23 or
23 after July 10 based on my vacation schedule.

24 MR. LIMAN: I think, your Honor, the latest date in
25 June that you have available and that you can see us.

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1 THE COURT: Because you guys are a little long winded,
2 let's do it, rather than doing it at 4 o'clock on the 23rd,
3 let's do it the 22nd at 2:30. If by some miracle you don't
4 need that date and you want to push it to July 11 or after, let
5 me know.

6 OK. Usual drill, the Court's orders are what you have
7 heard. The transcript contains the rulings, etc., etc, The
8 usual drill of the most involved parties buying the transcript.

9 With that, we are adjourned.

10 (Adjourned)

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